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COMMENT

Flores-Figueroa and the Search for Plain Meaning in Identity Theft Law

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Ignacio Flores-Figueroa, a citizen of Mexico working illegally in the United States, was convicted of aggravated identity theft in violation of 18 United States Code Section 1028A(a)(1).[1] He appealed his conviction, eventually all the way to the United States Supreme Court, which granted his Petition for a Writ of Certiorari on October 20, 2008.[2] The issue in the case was how far the term "knowingly" in § 1028A(a)(1)[3] should extend in a sentence.[4] At stake was whether or not the government had to prove that Flores-Figueroa knew that the identification materials used in the commission of a felony belonged to another person. While the contested issue was small, merely an argument over the grammatical interpretation of a single sentence, the outcome was of vital importance to millions of illegal immigrants living and working in the United States. If the

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1. United States v. Flores-Figueroa, 274 F. App'x 501 (8th Cir. 2008), *rev'd*, 129 S. Ct. 1886 (2009). The original Eighth Circuit case is a short, two page unpublished decision. This Comment, while in response to the *Flores-Figueroa* case, will highlight the opinions from other similar cases that led up to the decision in *Flores-Figueroa* and that were considered by the Supreme Court.

2. Flores-Figueroa v. United States, 129 S. Ct. 457 (2008).

3. 18 U.S.C. § 1028A(a)(1) (2006).

4. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1889 (2009).

government had its way, it would be able to use § 1028A(a)(1) as a weapon to combat illegal immigrants who misappropriated another's identification. If the petitioner's interpretation was accepted, the statute would affect only those who knowingly steal identification documents from a known person, and many illegal immigrants using forged identification documents for work purposes would be beyond its reach.

This Comment on identity theft law will serve as an introduction to the debate surrounding § 1028A(a)(1) and an analysis of the Supreme Court's recent decision in *Flores-Figueroa v. United States*.[5] Part I is an introduction, and it recounts the story of a United States Immigration and Customs Enforcement ("ICE") raid on a slaughterhouse in Iowa that unlawfully employed illegal immigrants. Although this was the largest raid to date, similar tales play themselves out in other cities and small towns across the country. Part II provides a general overview of identity theft and how it affects victims. Part III focuses on the Identity Theft Penalty Enhancement Act,[6] of which § 1028A(a)(1) is a part. Part IV reviews the circuit court cases interpreting § 1028A(a)(1) and the Supreme Court's decision in *Flores-Figueroa*. Finally, Part V discusses the impact that the decline in standards of grammar in society has on the meaning of the Supreme Court's "ordinary usage" analysis of statutory text. It also analyzes the three different approaches to statutory interpretation taken by the opinions in *Flores-Figueroa*.

I. INTRODUCTION

As the helicopters circled overhead, Rosa, a forty-year-old mother of two from Mexico, knew that her American dream had come to an end. Rosa had been employed at the Agriprocessors Inc. slaughterhouse for the past fifteen months and had lived in the United States illegally for the past thirteen years, working a variety of jobs in small Midwestern towns just like Postville, Iowa.[7] But today, as

5. *Id.*

6. Pub. L. No. 108-275, 118 Stat. 831 (2004) (codified in scattered sections of 18, 28 U.S.C.).

7. *See* Joe Friesen, *Hardening the Line on Illegal Workers: Largest Immigration Raid in U.S. History Highlights Enduring Tensions over Who*

shouts of "la migra," a Spanish term for immigration agents, echoed across the slaughterhouse floor and she hid among frozen chickens in an industrial sized freezer, her worst fears would finally be realized as the ICE agent tapped her on the shoulder and asked her to come with him.[8]

Antonio Escobedo was also at the plant that day. When he saw the choppers circling overhead, he immediately thought of his wife, who also worked at the plant.[9] Escobedo found his wife and "[t]he couple hid for hours inside the plant before obtaining refuge in the pews and hall at St. Bridget's Catholic Church, where hundreds of other Guatemalan and Mexican families gathered, hoping to avoid arrest."[10] Like Rosa, Escobedo and his wife would also be arrested by ICE agents that day.[11] Afterwards, he would say, "I like my job. I like my work. I like it here in Iowa," and would wonder, "[a]re they mad because I'm working?"[12]

The ICE raid on the Agriprocessors plant in Postville in 2008 was the culmination of a sixteen-month investigation and was "the largest criminal enforcement operation ever carried out by immigration authorities at a workplace."[13] The raid began at ten in the morning with "helicopters, buses and vans encircling the western edge of town . . . [and] [w]itnesses said hundreds of agents surrounded the plant in 10 minutes, [then] began interviewing workers and seized company records."[14] In total, 389 illegal immigrants were arrested that day, including "290 Guatemalans, 93 Mexicans, two Israelis and four Ukrainians, according to the U.S. Attorney's Office for the Northern District of Iowa."[15] Documents later filed in court would allege that "a

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Deserves a Place in American Society, GLOBE & MAIL (Toronto), May 24, 2008, at A18.

8. *See* Friesen, *supra* note 7.

9. Spencer S. Hsu, *Raid on Kosher Plant Rattles Iowa Town: 389 Immigrants Arrested; 600 Children Absent from School*, ST. PAUL PIONEER PRESS, May 18, 2008, at A6.

10. *Id.*

11. *See* Friesen, *supra* note 7; Hsu, *supra* note 9.

12. Hsu, *supra* note 9.

13. Julia Preston, *270 Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008, at A1.

14. Hsu, *supra* note 9.

15. *Id.*

search of social security numbers in late 2007 showed that more than 75 per cent of the nearly 1,000 Agriprocessors employees were using false documents."[16] Looking back on that day, Matt Dummermuth, the U.S. Attorney for Northern District of Iowa, would call the operation an "astonishing success."[17]

But for those arrested that day and for the town they once called home, things would never be the same. In a single day, more than ten percent of the town's 2,300 residents had been arrested.[18] The day after the raid "[h]alf of the school district's 600 students were absent[,] . . . including 90 percent of Hispanic children, because their parents were arrested or in hiding."[19] David Strudthoff, Postville Community Schools superintendent, said that what had happened to the town was "'like a natural disaster—only this one is manmade.'"[20] Mr. Strudthoff went on to say, "[t]hese people have been here 15 years and they're entwined in our families and in our community. . . . When 10 per cent of the population is imprisoned, it brings a community to its knees."[21] A man named Aurelio, an illegal immigrant who worked at the plant but was not working the day of the raid, had "[s]ix of his siblings . . . caught in the raid," and compared the day's events to "'an earthquake in [his] life.'"[22]

The illegal immigrants arrested at the plant were "herded onto buses and interned at the National Cattle Congress Fairgrounds, [seventy-five miles] away in Waterloo," and "[t]hey were kept there in a makeshift camp, behind a chain-link fence, watched by armed immigration officers."[23] The criminal proceedings were "unusually swift," and "297 immigrants pleaded guilty and were sentenced in four days," drawing criticism from the American

16. Friesen, *supra* note 7.

17. Preston, *supra* note 13.

18. Hsu, *supra* note 9.

19. *Id.*

20. *Id.*

21 Friesen, supra note 7.

22. *Id.*

23. *Id.*

Immigration Lawyers Association about possible due process violations.[24]

> The illegal immigrants, most from Guatemala, filed into the courtrooms in groups of 10, their hands and feet shackled. One by one, they entered guilty pleas through a Spanish interpreter, admitting they had taken jobs using fraudulent Social Security cards or immigration documents. Moments later, they moved to another courtroom for sentencing.[25]

Most of the immigrants pled guilty and "agreed to immediate deportation after they serve[d] five months in prison."[26] The plea bargains were part of a deal offered by the prosecutor in the case to avoid "felony identity theft charges that carry a mandatory two-year minimum jail sentence."[27] Not surprisingly, in order to work at the plant, many of the immigrants used real Social Security cards and visas that belonged to other people.[28] The reason for the guilty pleas is also not surprising; as one defendant put it: "'My family is worried in Guatemala. . . . I ask that you deport us as soon as possible, that you do us that kindness so we can be together again with our families.'"[29]

II. IDENTITY THEFT

Identity theft has been called the "crime of the new millennium"[30] and has been touted as the "'fastest growing crime in the United States.'"[31] Identity theft comes in

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24. *See* Preston, *supra* note 13.

25. *Id.*

26. *Id.*

27. *Id.* 18 U.S.C. § 1028A(a)(1) (2006) provides a mandatory two year sentencing increase for anyone who knowingly uses another's means of identification during the commission of an enumerated felony, such as fraudulent use of Social Security or immigration documents. *See* § 1028A(a)(1), (c).

28. Preston, *supra* note 13.

29. *Id.*

30. *See* Sean B. Hoar, *Identity Theft: The Crime of the New Millennium*, 80 OR. L. REV. 1423, 1423 (2001).

31. Donncha Marron, *'Alter Reality' Governing the Risk of Identity Theft*, 48 BRIT. J. CRIMINOLOGY 20, 20 (2008) (quoting Michael W. Perl, *It's Not Always About the Money*, 94 J. CRIM. L. & CRIMINOLOGY 169, 172 (2003)).

different forms, but at its core it is "the misuse of another individual's personal information to commit fraud."[32] In 2005, the Federal Trade Commission estimated the total losses from identity theft to businesses and consumers to be at least $15.6 billion.[33]

According to the Presidential Identity Theft Taskforce, identity theft has three basic stages in its "life cycle."[34] In the first stage, "the identity thief attempts to acquire a victim's personal information."[35] The potential means of acquisition are myriad and are limited only by the cunning and determination of the thief. Some typical examples include "low-tech methods," such as "dumpster diving" or stealing mail, wallets, or purses that contain personal information, as well as "complex and high-tech frauds," such as computer hacking, Trojan viruses, or other malicious computer programs.[36] Thieves can work alone as scammers or con artists, or as part of larger, more organized identity theft rings. In one case, "28 people [were charged] with participating in a fraud ring that supplied over 1,900 individuals with fraudulent Social Security cards. The cards were supplied by a Social Security Administration clerk in exchange for $70,000 in payoffs."[37] In 2006 alone, nearly seventy-three million people had their personal records lost or stolen and became potential identity theft victims.[38]

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32. PRESIDENTIAL IDENTITY THEFT TASKFORCE, COMBATING IDENTITY THEFT: A STRATEGIC PLAN 2 (2007) [hereinafter TASKFORCE REPORT], *available at* http://idtheft.gov/reports/StrategicPlan.pdf.

33. *See* FED. TRADE COMM'N, 2006 IDENTITY THEFT SURVEY REPORT 9 (2007) [hereinafter FTC SURVEY], *available at* http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf.

34. TASKFORCE REPORT, *supra* note 32, at 2.

35. *Id.*

36. *Id.*

37. *See* H.R. REP. NO. 108-528 at 5 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 781. For some other notable examples of both small scale and large scale identity theft, see Ronald Smothers, *State Report to Outline Lapses In Security at D.M.V. Offices*, N.Y. TIMES, Nov. 7, 2002, at A28, who reports that "corrupt clerks working [at the D.M.V.] have become a vital link in schemes to sell illegal identification documents"; and Brad Stone, *11 Charged in Theft of 41 Million Card Numbers*, N.Y. TIMES, Aug. 6, 2008, at C1, who writes that "Federal prosecutors have charged 11 people with stealing more than 41 million credit and debit card numbers, cracking what officials said on Tuesday appeared to be the largest hacking and identity theft ring ever exposed."

38. TASKFORCE REPORT, *supra* note 32, at 3.

The second stage of identity theft occurs when "the thief attempts to misuse the information he has acquired" either by selling it to others or by using it himself.[39] The misuse of this information usually occurs in one of three main ways: existing account fraud, new account fraud, and non-account identity theft.[40] Existing account fraud occurs when the thief uses stolen information to access a victim's existing financial accounts. This includes, for example, using a victim's credit card to make fraudulent purchases or using a victim's debit card and pin number to withdraw funds from the victim's bank account.[41] New account fraud occurs when a thief uses a victim's stolen information to open a new account, for example using Social Security numbers, birth dates, and home addresses to open bank accounts or apply for new credit cards.[42] Existing account fraud tends to occur more frequently than new account fraud, but new account fraud has the potential to be more costly to victims in terms of financial liabilities and damage to credit ratings because it is harder to detect.[43] According to the Federal Trade Commission, 6.5 million Americans were victims of existing account fraud and 1.8 million Americans were victims of new account fraud in 2005.[44]

Non-account identity theft is the use of "stolen personal information to obtain government, medical, or other benefits to which the criminal is not entitled."[45] Typical examples of non-account identity theft include immigration fraud, where illegal immigrants use Social Security numbers and passports to enter the country, employment fraud, where illegal immigrants, such as Flores-Figueroa and the other defendants who are the subject of this comment, use Social

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39. *Id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.* at 11; *see* FTC SURVEY, *supra* note 33, at 23. According to the Federal Trade Commission, 66% of existing account frauds are discovered within one month of the initial misuse, while 38% of new account frauds are discovered within one month. *Id.* Additionally, 24% of new account frauds went undiscovered for six months or more, while only 3% of existing account frauds went undetected over the same period. *Id.*

44. FTC SURVEY, *supra* note 33, at 3.

45. TASKFORCE REPORT, *supra* note 32, at 3.

Security numbers and other information to obtain employment, and medical identity theft, where stolen information is used to obtain medical treatment.[46] Non-account identity theft in the immigration and employment context is different from the other types of identity theft because the motive of those misusing the information is often not to inflict financial harm on their victims, but rather the goal is to "us[e] fraudulent Social Security numbers to conduct their daily lives."[47] According to the Federal Trade Commission, twenty percent of total identity theft victims reported that their information was used in non-account identity theft.[48]

Finally, in the third stage of identity theft, "an identity thief has completed his crime and is enjoying the benefits, while the victim is realizing the harm."[49] The victim often first learns about the theft from "being denied credit or employment, or being contacted by a debt collector seeking payment for a debt the victim did not incur."[50] Often in employment fraud cases, victims, such as the true owner of the information Flores-Figueroa used to obtain employment, learn of the theft when they "receive[ ] letters from the Internal Revenue Service demanding back taxes for income they had not reported because it was earned by someone working under their name."[51] Still other victims learn of the theft after being "denied driver's licenses, credit or even medical services because someone had improperly used their personal information before."[52] The time it takes for a theft to be discovered varies depending on the type of

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46. *See id.* at 20.

47. *See* John Leland, *Some ID Theft is Not for Profit, But to Get a Job*, N.Y. TIMES, Sept. 4, 2006, at A1. In at least one way, American taxpayers are indirectly benefited by employment identity fraud, as "[t]he Social Security Administration each year receives eight million to nine million earnings reports from the Internal Revenue Service filed under names that do not match the Social Security numbers." *Id.* These mismatches provide a "boon to the Social Security trust fund, [and i]n the 1990's, such mismatches accounted for around $20 billion in Social Security taxes paid." *Id.*

48. FTC SURVEY, *supra* note 33, at 62.

49. TASKFORCE REPORT, *supra* note 32, at 3.

50. *Id.*

51. *Id.* at 20.

52. *Id.*

misuse,[53] and victims tend to experience problems and financial repercussions long after the initial discovery of the theft.[54]

According to the Federal Trade Commission, existing account identity thieves in 2005 typically obtained $350 to $457 from their victims, with individual victims reporting losses as high as $6000 to $7000.[55] New account identity thieves typically obtained $1350 from their fraudulent use of a victim's information, with reports of individual cases of thieves obtaining as much as $15,000 to $30,000 from their crimes.[56] Typically out of pocket expenses to victims are low, but there have been reported cases of expenses ranging from $1200 to $5000.[57] Additionally, victims of identity theft must spend time and effort restoring their identity and experience a wide variety of associated problems as well.[58] Typical problems associated with identity theft include "being harassed by collections agents, being denied new credit, being unable to use existing credit cards, being unable to obtain loans, having their utilities cut off, being subject to a criminal investigation or civil suit, being arrested, and having difficulties obtaining or accessing bank accounts."[59] Thus, while it may be true that non-account identity thieves, such as Flores-Figueroa, are merely using the stolen information to conduct their daily lives, their actions still have very real consequences for their victims.

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53. *See* statistics, *supra* note 43.

54. *See* TASKFORCE REPORT, *supra* note 32, at 11-12.

55. FTC REPORT, *supra* note 33, at 5.

56. *Id.*

57. *Id.* at 6; TASKFORCE REPORT, *supra* note 32, at 11. Costs to victims are usually low because an individual's liability for fraudulent credit card charges (one of the most prevalent forms of ID theft) is limited to $50, and most, if not all, of the major carriers typically waive this charge. *See* Electronic Privacy Information Center, *Identity Theft: Understanding the Causes of Identity Theft*, http://epic.org/privacy/idtheft/ (last visited Dec. 6, 2009) [hereinafter EPIC].

58. *See* FTC SURVEY, *supra* note 33, at 6-7 ("The median value for the number of hours spent resolving problems by all victims was 4. However, 10 percent of all victims spent at least 55 hours resolving their problems. The top 5 percent of victims spent at least 130 hours.").

59. *Id.* at 7.

III. THE STATUTE: 18 U.S.C. § 1028A(A)(1)

To address the growing "national crisis" of identity theft, [60] Congress amended or enacted a number of statutes designed to target the practice in the late 1990s and the early 2000s.[61] The statutes "provide[] an expansive definition of identity theft. . . . [that] includes the misuse of any identifying information, which could include name, [Social Security number], account number, password, or other information linked to an individual, to commit a violation of federal or state law."[62]

In 2004, Congress passed the Identity Theft Penalty Enhancement Act to "address[ ] the growing problem of identity theft" and to "enhance[ ] penalties for persons who steal identities to commit terrorists acts, immigration violations, firearms offenses, and other serious crimes."[63] The statute at issue in the Flores-Figueroa case, as well as the other cases discussed in this Comment, is § 1028A, titled Aggravated Identity Theft, which provides:

> (a) Offenses.—
>
> (1) In general.—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.
>
> (2) Terrorism offense.—Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document

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60. *See Protecting Privacy and Preventing Misuse of Social Security Numbers: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 107th Cong. 16 (2001) (statement of Hon. James G. Huse, Jr., Inspector General, Social Security Administration).

61. *See, e.g.*, Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007; 18 U.S.C. § 1028A (2006).

62. TASKFORCE REPORT, *supra* note 32, at 101 n.1.

63. H.R. REP. NO. 108-528, at 5 (2004), *as reprinted in* 2004 U.S.C.C.A.N. 779, 779.

> shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.[64]

An "enumerated felony" is defined in § 1028A(c) as any felony violation of any of the following:

> (1) section 641 (relating to theft of public money, property, or rewards), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);
>
> (2) section 911 (relating to false personation of citizenship);
>
> (3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);
>
> (4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);
>
> (5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);
>
> (6) any provision contained in chapter 69 (relating to nationality and citizenship);
>
> (7) any provision contained in chapter 75 (relating to passports and visas);
>
> (8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);
>
> (9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);
>
> (10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or
>
> (11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).[65]

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64. 18 U.S.C. § 1028A(a)(1)-(2).

65. 18 U.S.C. § 1028A(c) (footnote omitted).

The wide variety of predicate felonies ensure that the Aggravated Identity Theft statute can be applied by prosecutors in many different situations, including, significantly for Flores-Figueroa, the immigration and employment contexts.

It is important to note that this offense carries a mandatory sentencing increase of two to five years, depending on whether it is a general § 1028A(a)(1) offense or a more serious terrorism offense under § 1028A(a)(2). As a result, prosecutors can use the threat of an aggravated identity charge as leverage to ensure an early plea bargain from defendants to the underlying felony.[66] In the case of illegal immigrants, an agreement to immediate deportation is often a term of the plea bargain.[67]

In light of the mandatory nature of § 1028A(a)(1) and the serious consequences its application has on illegal immigrants, there has been much debate over the statute's meaning. The debate centers on the reach of the word "knowingly" in the statute. The government's interpretation of the statute would limit the knowledge requirement to the verbs "transfers, possesses, or uses," or, at most, to the direct object of the verbs "a means of identification," thus freeing the prosecutor from the burden of proving that the defendant knew the "means of identification" belonged to another person. Flores-Figueroa's interpretation, and that of the other defendants like him, is that the knowledge requirement extends to the phrase "of another person," thus making the prosecutor's burden of proof more difficult and hopefully, in the defendants' view, exempting illegal immigrants who purchase identification information from third parties for employment purposes from punishment under § 1028A(a)(1).

IV. THE CASES

Although others before him had appealed similar cases to the Supreme Court,[68] Flores-Figueroa's petition for a Writ

66. *See* Editorial, *And Unequal Justice for Some*, N.Y. TIMES, Feb. 25, 2009, at A26; Preston, *supra* note 13.

67. *See* Preston, *supra* note 13.

68. *See, e.g.*, United States v. Mendoza-Gonzalez, 520 F.3d 912 (8th Cir. 2008) *vacated*, 129 S. Ct. 2377 (2009); United States v. Hurtado, 508 F.3d 603 (11th

of Certiorari was granted by the Supreme Court because his lawyers had the benefit of making arguments based on the decisions of six prior circuit court cases.[69] This part will review the opinions of the other circuit courts on § 1028A(a)(1) and the Supreme Court's decision in *Flores-Figueroa.*

The following six circuit court decisions provide a rich variety of opinions on the proper interpretation of § 1028A(a)(1). The circuits were evenly split on the issue. The D.C., First, and Ninth Circuits agreed with the defendant's interpretation of the statute, that the knowledge requirement extended to the phrase "of another person;" while the Fourth, Eighth, and Eleventh Circuits agreed with the government and held that the prosecution was not required to prove that the defendant knew the means of identification used belonged to another person. Although the three former circuits ultimately agreed with the defendant's interpretation of § 1028A(a)(1), they found the statute to be ambiguous and resolved the ambiguity in different ways. The latter circuits, on the other hand, did not find the statute ambiguous, and held that the statutory text clearly supported the government's reading of § 1028A(a)(1).

A. *District of Columbia Circuit Court of Appeals*

In *United States v. Villanueva-Sotelo*, the defendant, a Mexican national, presented District of Columbia Metropolitan Police officers with a permanent resident card that displayed "his own name and photograph, listed Mexico as his country of origin, and included an alien registration number."[70] Although Villanueva-Sotelo knew that the registration number was fake and that it did not belong to him, the government in the case conceded that it did not have any evidence to prove that he knew that the registration number in fact belonged to another person.[71] Villanueva-Sotelo moved to dismiss the third count of the

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Cir. 2007), *cert. denied*, 128 S. Ct. 2903 (2008); United States v. Montejo, 442 F.3d 213 (4th Cir. 2006), *cert. denied*, 549 U.S. 879 (2006).

69. *See* Reply Brief for the Petitioner at 1-2, Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009) (No. 08-108).

70. 515 F.3d 1234, 1236 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2377 (2009).

71. *Id.*

indictment for aggravated identity theft,[72] arguing that the government was required "to prove he actually knew the alien registration number belonged to another person."[73] After a "particularly illuminating" discussion with the prosecutor,[74] the district court judge agreed with Villanueva-Sotelo's interpretation of the statute and dismissed the aggravated identity theft count.[75]

On the government's appeal, the District of Columbia Circuit Court of Appeals decided that "knowingly" must at least extend to the direct object's principal modifier, "of identification," because "were it otherwise, a person could be convicted for 'knowingly us[ing] or transfer[ring],' without lawful authority, anything at all that happened to contain a means of identification."[76] Having come this far, the court seemed unsure of how to deal with the statute's final prepositional phrase, "of another person."[77] Finding both the government's interpretation, halting the reach of knowingly to "of identification," and Villanueva-Sotelo's interpretation,

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72. 18 U.S.C. § 1028A(a)(1) (2006).

73. *Villanueva-Sotelo*, 515 F.3d at 1236.

74. The "particularly illuminating" discussion from the trial hearing on April 4, 2007:

> [PROSECUTOR]: [I]t is stealing in the sense that if I make up a number and it belongs to someone else, I have taken that person's number that was rightfully assigned by a U.S. agency.
>
> THE COURT: If you make up the number?
>
> [PROSECUTOR]: Yes. If I—
>
> THE COURT: What if you make up a number that doesn't belong to anybody?
>
> [PROSECUTOR]: Then you don't charge the offense, there is no offense because it's not a means of identification of another person.
>
> THE COURT: So if the defendant picked a number out of the air and it was [your] number, he's guilty, but if he picked a number out of the air and [Immigration and Customs Enforcement] hasn't assigned it to anybody, he's not guilty?
>
> [PROSECUTOR]: That's correct.

Id. at 1236-37 (alterations in original).

75. *Id.* at 1237.

76. *Id.* at 1238 (alterations in original).

77. *Id.* at 1239 ("But what of the second and crucial prepositional phrase 'of another person'?").

extending the reach of knowingly to "of another person," equally plausible, the majority ultimately concluded that the language of the statute was ambiguous.[78]

To resolve the text's ambiguity, the majority looked to the "statutory structure, relevant legislative history, [and] congressional purposes expressed in the [statute.]"[79] The majority found support for Villanueva-Sotelo's version of congressional intent[80] in the statute's title, "Aggravated identity theft,"[81] the legislative history,[82] and the statute's floor debate.[83] Summing up their review of the legislative history, the court concluded that "[a]t no point in the legislative record did anyone so much as allude to a situation in which a defendant 'wrongfully obtain[ed]' another person's personal information unknowingly, unwittingly, and without intent."[84] Instead, the court decided that the intent of the statute was to reach intentional theft rather than the conduct of Villanueva-

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78. *See id.* at 1239-43.

79. *Id.* at 1243 (alteration in original) (quoting Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985)).

80. "Villanueva-Sotelo argues that Congress intended to target identity theft and the thieves who perpetrate it, rather than to create a sentencing enhancement for individuals who use fraudulent identifying information belonging purely by happenstance to someone else." *Id.*

81. The court noted:

> As [the] title demonstrates, the statute concerns "theft," i.e., "the felonious taking and removing of personal property with intent to deprive the rightful owner of it." Yet Villanueva-Sotelo, having had no idea that his forged alien registration number belonged to anyone at all, couldn't possibly have had the intent to deprive another person of his or her identity. . . . That's not theft.

Id. (citation omitted).

82. *Id.* at 1243-44 (explaining the statute's purpose "to target and punish 'identity *thieves*,'" describing how identity thieves "obtain[ ] individuals' personal information for misuse," and listing examples of identity theft where, in each case, "the thief knew the stolen information belonged to another person" (alteration in original)).

83. *Id.* at 1244-45 ("This legislation will allow prosecutors to identify identity thieves who *steal* an identity . . . for purposes of committing one or more crimes. . . . [T]he legislation would facilitate the prosecution of criminals who *steal* identities in order to commit felonies . . . ." (emphasis added)).

84. *Id.* at 1245 (alternation in original).

Sotelo, which was mere "accidental misappropriation."[85] Accordingly, the court held "that section 1028A(a)(1)'s mens rea requirement extends to the . . . statute's defining element—that the means of identification used belongs to another person,"[86] thus bringing the mens rea requirements of the statute more in line with traditional, common law notions of theft.[87]

B. *First Circuit Court of Appeals*

In *United States v. Godin*, the defendant "defrauded eight banks and credit unions" by opening accounts using Social Security numbers that she fabricated "by altering the fourth and fifth digits of her own social security number."[88] The First Circuit Court of Appeals attempted a grammatical breakdown of the different parts of the § 1028A(a)(1).[89] The court noted that "in a purely grammatical sense, 'knowingly,' as an adverb, modifies only the verbs," but it also stressed that interpreting a statute is not a "purely grammatical exercise" because "in criminal statutes, adverbs that are also *mens rea* requirements frequently

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85. *Id.* at 1246.

86. *Id.*

87. *See, e.g.*, BLACK'S LAW DICTIONARY 1516 (8th ed. 2004) ("[Theft is t]he felonious taking and removing of another's personal property with the intent of depriving the true owner of it . . . ."); O.W. HOLMES, JR., THE COMMON LAW 71 (1881) ("Larceny is 'the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specifically to another, with intent to deprive such owner of his ownership therein.'" (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 431 (1881))).

88. 534 F.3d 51, 54 (1st Cir. 2008).

89. The court determined that:

> "Knowingly," as an adverb, modifies the verbs "transfers, possesses, or uses." The prepositional phrase "without lawful authority" is an adverb phrase that also modifies the verbs. "Means" is the direct object of the verbs, and the prepositional phrase "of identification" is an adjective phrase that modifies the direct object. Finally, the prepositional phrase "of another person" is an adjective phrase that modifies "identification." Together, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" is a participial phrase describing the subject "whoever."

Id. at 56.

extend to non-verbs." [90] Furthermore, the court emphasized that it was interpreting "a criminal statute and not an English textbook," so the grammatically correct reading of the statute was not necessarily "the best or even [the] most likely reading of § 1028A(a)(1)."[91] With this in mind, the court found the question of whether "knowingly" extends to "of another person" to be ambiguous. [92] In reaching this conclusion, the court relied on the Supreme Court's decision in *Liparota*, where the court concluded that looking at the statutory text alone could not answer the question of how far "knowingly" extended in a similarly worded statute.[93]

After failing to resolve the ambiguity through an in-depth analysis of the "surrounding language and the statute's structure," [94] the title of the statute,[95] and the statute's legislative history,[96] the court found that it was "unable to ascertain whether Congress intended the 'knowingly' *mens rea* requirement to extend to 'of another person.'"[97] Facing a statute with such "grievous ambiguity," the court concluded that the rule of lenity required it to

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90. *Id.*

91. *Id.* at 57.

92. *Id.* at 58.

93. *Id.* ("Either limiting knowingly to the verbs and their direct objects or extending it throughout the entire phrase 'would accord with ordinary usage.'" (quoting Liparota v. United States, 471 U.S. 419, 424 (1985))).

94. *Id.* (quoting United States v. Jimenez, 507 F.3d 13, 19 (1st Cir. 2007)). The court compared § 1028(a)(1) to § 1028(a)(2) but found that this failed to resolve the ambiguity. *Id.* at 59.

95. *Id.* While the use of the word "theft" in the title tends to imply an intentional act, the court found that "[i]t is also plausible that Congress intended to define 'identity theft' as *using* someone else's identity rather than *taking* someone else's identity." *Id.*

96. *Id.* at 59-60. The court found that the House Report accompanying the Identity Theft Penalty Enhancement Act was replete with the terms "theft" and "thieves," and that one of the stated purposes of the statute was to increase sentences for identity thieves. The report also gave "examples of identity theft that fit comfortably within the traditional definition of theft." *Id.* While the court agreed that it would be reasonable to conclude that Congress intended to only punish "those who knowingly use another's identification," they pointed out that there was also ample evidence to support an interpretation that it was Congress's "intent to cover actions that do not fit the traditional definition of theft." *Id.*

97. *Id.* at 61.

resolve the ambiguity in the statute in the defendant's favor, and thus held that the "knowingly" extended to "of another person."[98]

C. *Fourth Circuit Court of Appeals*

In *United States v. Montejo*, the defendant attempted to obtain employment by using a fake resident alien card and a Social Security card with his name and photograph, but while using "fabricated numbers."[99] Far from being fabricated, the alien registration number "had been assigned to a Tanzanian man named Nassim Mohamed Leon," and the "Social Security number used by Montejo had actually been assigned to another person."[100] Montejo apparently "walked into the United States in January 2002 and had purchased, in Phoenix, Arizona, the Resident Alien card and the Social Security card for $60.00 . . . and [then] used the cards to obtain employment."[101]

The Fourth Circuit Court of Appeals began its analysis of the aggravated identity theft statute by looking at the statutory language and structure.[102] The court looked at the grammatical structure of the statute and concluded that

> as a matter of common usage, "knowingly" does not modify the entire lengthy predicate[, "a means of identification of another person,"] that follows it. Simply placing "knowingly" at the start of this long predicate does not transform it into a modifier of all the words that follow. Good usage requires that the limiting modifier, the adverb "knowingly," be as close as possible to the words which it modifies, here, "transfers, possesses, or uses."[103]

The court then analogized the aggravated identity theft statute to a "grammatically [in]distinguishable" statute from a precedential Fourth Circuit case, in which the court

98. *Id.* at 60-61.

99. 442 F.3d 213, 214 (4th Cir. 2006).

100. *Id.*

101. *Id.*

102. *Id.* at 215.

103. *Id.* (citing ROBERT FUNK ET AL., THE ELEMENTS OF GRAMMAR FOR WRITERS ch. 4 (1991)).

determined that "'knowingly' extended to the [direct] object . . . but not to the prepositional phrase modifying it."[104] Furthermore, the court distinguished the aggravated identity theft statute from the statute at issue in a Supreme Court case that was found to be grammatically ambiguous because that case's "discussion of the scope of 'knowingly' should not be understood apart from the Court's primary stated concern: avoiding criminalization of otherwise non-culpable conduct."[105] Concluding their analysis of the statutory text, the court held that the aggravated identity theft statute was not ambiguous and that "the defendant need not be aware of the actual assignment of the numbers to an individual to have violated the statute."[106]

D. *Eighth Circuit Court of Appeals*

In *United States v. Mendoza-Gonzalez*, the defendant "completed a Form I-9 in connection with his employment at a Swift & Company ("Swift") pork processing plant . . . in which he represented that he was a 'citizen or national of the United States,' and submitted a photo identification card in the name of Dinicio Gurrola III to verify his identity."[107] Immigration and Customs Enforcement agents "conducted a raid at the Swift plant," and Mendoza-Gonzalez was charged with a five-count indictment, including a charge of "aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1)."[108] The jury in the district court convicted Mendoza-Gonzalez on all counts, and he appealed, arguing that the Government failed to prove the essential elements of § 1028A(a)(1) because it did not show "beyond a reasonable doubt that Mendoza-Gonzalez had actual knowledge that the identification he used belong[ed] to an

104. *See id.* at 216 (discussing *United States v. Cook*, 76 F.3d 596 (4th Cir. 1996)).

105. *Id.* (discussing *Liparota v. United States*, 471 U.S. 419 (1985)). As other Circuit Courts have more clearly explained, the concern of criminalizing non-culpable conduct is not present in this statute because aggravated identity theft can only be committed "during and in relation to any felony violation enumerated in subsection (c)" of the statute. 18 U.S.C. § 1028A(a)(1) (2006). *See* discussion, *infra*, Part IV.E-F.

106. *Montejo*, 442 F.3d at 217.

107. 520 F.3d 912, 913-14 (8th Cir. 2008).

108. *Id.* at 914.

actual person, that Gurrola was an actual person and that Gurrola was still a living person at the time Mendoza-Gonzalez fraudulently used his identification."[109]

The Eighth Circuit Court of Appeals began by describing the process of statutory interpretation:

> In interpreting a statute we first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. If so, we apply the plain language of the statute. Only if the language is ambiguous may we look beyond the text. However, [a] mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong.[110]

The court noted that "'[g]ood usage requires that the limiting modifier, the adverb 'knowingly,' be as close as possible to the words which it modifies,'"[111] and additionally; "'[t]he fact that ['knowingly'] is placed before the verbs 'transfers, possesses, or uses' indicates that [it] modifies those verbs, not the later language in the statute.'"[112] As further support for their grammatical analysis, the court reasoned that the "last antecedent rule holds that qualifying words and phrases usually apply only to the words or phrases immediately preceding or following them, not to others that are more remote."[113] While recognizing that the last antecedent rule "is not an absolute and can assuredly be overcome by other indicia of meaning," the court ultimately concluded that "the plain language of § 1028A(a)(1) limits 'knowingly' to modifying 'transfers, possesses, or uses' and not 'of another person.'"[114] Since the court concluded that this was the unambiguous meaning of the statute, the government "was not required to prove that

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109. *Id.*

110. *Id.* (alteration in original) (citation omitted).

111. *Id.* at 915 (quoting United States v. Montejo, 442 F.3d 213, 215 (4th. Cir. 2006)).

112. *Id.* (quoting United States v. Hurtado, 508 F.3d 603, 609 (11th Cir. 2007)).

113. *Id.* (citing NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:33 (7th ed. 2007)).

114. *Id.* (citing Barnhart v. Thomas, 540 U.S. 20, 26 (2003)).

Mendoza-Gonzalez knew that Gurrola was a real person to prove he violated § 1028A(a)(1)."[115]

E. *Ninth Circuit Court of Appeals*

In *United States v. Miranda-Lopez*, the defendant attempted to "enter the United States using a resident alien card in the name of 'Jorge A. Garcia Fregoso.'"[116] The identification card turned out to be authentic, and had been validly issued not to Miranda-Lopez, but to Jorge A. Garcia Fregoso.[117] At trial, the defendant testified that "he had never seen the Garcia-Fregoso permanent resident card before" and that "the identification card did not belong to him."[118] The district court found Miranda-Lopez guilty of aggravated identity theft, and he appealed, arguing that the government "failed to prove that [he] actually knew that the identification belonged to another person."[119]

The Ninth Circuit Court of Appeals stated that the main issue in the case was whether "the adverb 'knowingly' in the statute modif[ies] 'of another person' or merely 'transfers, possesses, or uses.'"[120] Comparing plain meaning of the language of the aggravated identity theft statute to the ones at issue in *United States v. Liparota*[121] and *United States v. X-Citement Video, Inc.*,[122] the court reasoned that § 1028A(a)(1) was just as ambiguous.[123] Indeed, the court determined that § 1028A(a)(1) could "plausibly be interpreted to require knowledge only of the transfer, possession, or use of a means of identification," but also

115. *Id.*

116. 532 F.3d 1034, 1035 (9th Cir. 2008).

117. *Id.* at 1036.

118. *Id.*

119. *Id.* at 1037.

120. *Id.* at 1038.

121. 471 U.S. 419, 433 (1985) (holding that the government was required to "prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations" in a grammatically ambiguous statute).

122. 513 U.S. 64, 77-78 (1994) (extending the reach of "knowingly" in a statute to prevent the criminalization of innocent conduct and to provide a mens rea requirement to an element of the crime).

123. *See Miranda-Lopez*, 532 F.3d at 1038-39.

found that it would "not [be] unreasonable to read 'knowingly' to modify all of the subsequent phrases in the sentence," including the phrase "of another person."[124] Accepting the grammatical analysis of the D.C. Circuit,[125] the court considered the legislative history of § 1028A(a)(1), concluding that "[i]n this case, the legislative history does not definitely resolve the question of what 'knowingly' is meant to modify."[126]

Finding the statute ambiguous and the legislative history unpersuasive, the court turned to the rule of lenity, which requires a court to "resolve any ambiguity in the scope of a criminal statute in favor of the defendant."[127] Accordingly, the court held that "the government was required to prove that Miranda-Lopez knew that the identification belonged to another person," noting that "this is not an insurmountable burden, especially in [this] case where the identification document contains someone else's photo and does not appear to be a fake."[128]

F. *Eleventh Circuit Court of Appeals*

In *United States v. Hurtado*, the defendant submitted a passport application for the name Marcos Alexis Martinez Colon, using "a birth certificate and driver's license in the same name" as supporting documents.[129] While all of the documents were authentic, a passport specialist reviewing Hurtado's application noticed some discrepancies between the application and the documents, indicating fraud.[130] Upon

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124. *Id.*

125. *See id.* at 1039 ("In holding that the language of § 1028A(a)(1) is ambiguous, we follow the D.C. Circuit's reasoning . . . [and] detailed grammatical analysis."); *see also* discussion of *Villanueva-Sotelo*, *supra* Part IV.A.

126. *See id.* at 1039 (briefly summarizing the D.C. Circuit's analysis of § 1028A(a)(1)'s legislative history).

127. *Id.* at 1040 (citing United States v. Santos, 128 S. Ct. 2020, 2025 (2008) and Liparota v. United States, 471 U.S. 419, 427 (1985)).

128. *Id.*

129. 508 F.3d 603, 604 (11th Cir. 2007).

130. *Id.* ("Among other things, [the passport specialist] noticed that (1) the ages of the applicant's parents were written instead of the requested dates of birth, (2) the supporting driver's license was issued shortly before the passport

further investigation, federal agents discovered that Hurtado had "bought a visa in Columbia to come to the United States, and . . . he later bought identification papers from a friend in Boston so he could obtain a passport and visit his family in Columbia."[131]

The Eleventh Circuit Court of Appeals affirmed Hurtado's conviction on two counts of aggravated identity theft.[132] Analyzing the plain meaning of the statute, the court held that the phrase "without lawful authority" was intended to reach a broader range of conduct than theft, and the court also found that the Hurtado's unauthorized use of the identification information was well within the scope of § 1028A(a)(1).[133] In reaching this conclusion, the court found that "[t]he fact that Congress used the word 'stolen' in § 1028, but chose the broader phrase 'without lawful authority' in § 1028A(a)(1) plainly indicate[d] that Congress intended to prohibit a wider range of activities in § 1028A(a)(1) than just theft."[134]

Regarding the knowledge requirement, the court found that "[t]he fact that the word 'knowingly'—an adverb—is placed before the verbs 'transfers, possesses, or uses' indicates that 'knowingly' modifies those verbs, not the later language in the statute."[135] Furthermore, the court reasoned that "[i]f Congress had intended to extend the knowledge requirement to other portions of this subsection, it could have drafted the statute to prohibit the knowing transfer, possession, or use, without lawful authority, of the means of identification 'known to belong to another actual person.'"[136] Without such language in the statute, the court held that

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application was submitted, and (3) the signature was printed with the surname Martinez misspelled.").

131. *Id.* at 605. The defendant later told federal agents that he "bought a visa to come to the United States for $7000." *Id.* at 606.

132. *Id.* at 610.

133. *Id.* at 607 ("For sure, stealing and then using another person's identification would fall within the meaning of 'without lawful authority.' However, there are other ways someone could possess or use another person's identification, yet not have 'lawful authority' to do so. There is no dispute here that Hurtado did not have any authority, much less lawful authority, to use [the victim's] identification.").

134. *Id.* at 608. *Compare* 18 U.S.C. § 1028 (2006), *with* § 1028A(a)(1).

135. *Hurtado*, 508 F.3d at 609.

136. *Id.*

the "plain language" of § 1028A(a)(1) did not dictate extension of the knowledge requirement to the phrase "of another person."[137]

G. *The Supreme Court*

In *Flores-Figueroa v. United States*, the defendant, a citizen of Mexico, "gave his employer a false name, birth date, and Social Security number, along with a counterfeit alien registration card."[138] The numbers on these cards did not belong to a real person.[139] In 2006, Flores-Figueroa gave his employer new counterfeit cards using his real name.[140] ICE agents discovered that the numbers on these new cards were numbers that had previously been assigned to other people, and Flores-Figueroa was charged with aggravated identity theft under § 1028A(a)(1) along with two predicate offenses.[141] The district and circuit court both held that the government need not prove that Flores-Figueroa knew that the identification documents belonged to another person.[142] Flores-Figueroa appealed and the Supreme Court granted certiorari to consider the knowledge requirements of § 1028A(a)(1).[143]

The Supreme Court, in a majority opinion authored by Justice Breyer, began its analysis by pointing out that "[a]s a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime."[144] Using the example sentence, "Smith knowingly transferred the funds to the account of his brother," the majority pointed out that the "adverb [*knowingly*] that modifies the transitive verb

137. *See id.* at 609-10 (concluding that the Supreme Court's concerns about criminalizing "otherwise innocent conduct" in *X-Citement Video* and *Liparota* were not present in this case, and that this distinction weighed against making a similar extension of the knowledge requirement to the phrase "'of another person' in § 1028A(a)(1)").

138. 129 S.Ct. 1886, 1889 (2009).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 1890.

[*transferred*] tells the listener how the subject performed the entire action, including the object [*funds*] as set forth in the sentence."[145] In this example, the reader would normally understand that "Smith knew the account was his brother's," and "if the bank official later told us that Smith did not know the account belonged to Smith's brother, we should be surprised."[146] Notably, the majority allowed for a possible exception to the plain meaning reading implied by ordinary English in sentences that "involve special contexts or themselves provide a more detailed explanation of background circumstances that call for such a reading."[147] Although the majority did not provide any examples of what these special contexts may be, it concluded that none were present in § 1028A(a)(1).[148] Furthermore, the majority pointed out that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element."[149]

Having apparently determined that the sentence involved is grammatically unambiguous,[150] the majority nonetheless looked to the government's arguments to see if there was any reason sufficient to "overcome the ordinary meaning" of the statute.[151] The Court considered and rejected arguments based on a comparison between § 1028A(a)(1) and § 1028A(a)(2),[152] the statute's expressed

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145. *Id.*

146. *Id.*

147. *Id.* at 1891.

148. *Id.*

149. *Id.* (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 79 (1994) (Stevens, J., concurring)).

150. The Court never actually said that § 1028A(a)(1) is unambiguous, but did say that "courts ordinarily interpret criminal statutes" according to "ordinary English usage" absent special contexts that were not present here. *Flores-Figueroa*, 129 S. Ct. at 1891.

151. *Id.* at 1894.

152. *Id.* at 1892 (rejecting the argument because of "faulty" reasoning). See *United States v. Miranda-Lopez*, 532 F.3d 1034, 1041-43 (Bybee, J., concurring in part & dissenting in part), for an in-depth discussion of this argument. Bybee points out that the aggravated identity theft statute contains two separate offenses, the general § 1028A(a)(1) version, and a more serious, terrorism-related version under § 1028A(a)(2). *Id.* at 1042. The wording of the two versions is mostly identical, but § 1028A(a)(2) adds the phrase "or a false

purpose and legislative history,[153] and the difficulty of proving knowledge under the statute.[154]

Ultimately, the majority held that the "ordinary meaning" of § 1028A(a)(1) requires the government to show knowledge, and in doing so essentially disagreed with the analytical approach taken by all six circuit court opinions. Contrary to the statutory interpretation employed by the circuit courts,[155] the Court did not end its analysis upon determining the plain meaning of the statute, but instead looked to see if there were any indicia of intent that would be sufficient to "overcome" this ordinary meaning.[156]

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identification document" after § 1028A(a)(1)'s final phrase "of another person." *Id.* He argues that the congressional addition of this phrase in § 1028A(a)(2) makes it unreasonable to extend the knowledge requirement to "of another person" in § 1028A(a)(1). *Id.* at 1042-43. While Bybee agrees that extending the knowledge requirement in § 1028A(a)(1) would be "a reasonable reading [of the statute], read in isolation," he argues that doing so would require the knowledge requirement in § 1028A(a)(2) to be similarly extended through both "of another person" and "or a false identification document." *Id.* at 1042. To do so in § 1028A(a)(2), he argues, would be "unnecessary and perhaps absurd" because it would be "superfluous," as "[a] person who knowingly transfers a means of identification without lawful authority must necessarily know that the identification either belongs to another person or that it is false; there are no other choices." *Id.* Thus, in Bybee's view, the Supreme Court "should *not* read mens rea language that is inconsistent with subsection (a)(2) into an identical and contemporaneously-adopted subsection (a)(1)." *Id.* at 1043.

153. *Flores-Figueroa*, 129 S. Ct. at 1892-93 (rejecting the argument because the legislative history is inconclusive and supports either inference).

154. *Id.* at 1893 (rejecting the argument because "in the classic case of identity theft, intent is generally not difficult to prove" and "the concerns about practical enforceability are insufficient to outweigh the clarity of the text").

155. *See, e.g.*, United States v. Godin, 534 F.3d 51, 56 (1st Cir. 2008) ("If the meaning of the text is unambiguous our task ends there as well. If the statute is ambiguous, we look beyond the text to the legislative history in order to determine congressional intent." (citation omitted)); United States v. Mendoza-Gonzalez, 520 F.3d 912, 914 (8th Cir. 2008) (noting that where statutory text is unambiguous "we apply the plain language of the statute" and that "[o]nly if the language is ambiguous may we look beyond the text"); United States v. Villanueva-Sotelo, 515 F.3d 1234, 1237 (D.C. Cir. 2008) ("[If] the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case . . . our inquiry ends and we apply the statute's plain language. But if we find the statutory language ambiguous, we look beyond the text for other indicia of congressional intent.").

156. *Flores-Figueroa*, 129 S. Ct. at 1894.

In an opinion concurring in part and concurring in the judgment, Justice Scalia underscored the majority's departure from strictly textual statutory interpretation, while nonetheless agreeing with the ultimate result. He pointed out that "the Court is not content to stop at the statute's [unambiguous] text," and refused to join the portion of the majority's opinion searching for reasons to overcome the ordinary meaning of § 1028A(a)(1).[157] Scalia made it clear that he would oppose any attempt "to mak[e] criminal what the text would otherwise permit" by resorting to legislative history to overcome a statute's plain grammatical meaning.[158] Scalia would also be opposed to a categorical rule of statutory interpretation extending a knowledge requirement to each element of a crime where the statutory text has attempted to grammatically limit such an extension.[159] Ultimately, Scalia concluded that the "statute's text is clear" and argued that any discussion by the majority beyond this fact was unnecessary and inappropriate.[160]

In another opinion concurring in part and concurring in the judgment, Justice Alito argued that "the Court's point about ordinary English usage is overstated," and he feared that "the Court's opinion may be read by some as adopting an overly rigid rule of statutory construction."[161] Alito would take a contextual approach to interpreting a criminal statute where a court would "begin with a general presumption that the specified *mens rea* applies to all the elements of [the] offense," but where the parties would be allowed to "rebut that presumption" in special contexts.[162]

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157. *Id.* (Scalia, J., concurring in part & concurring in judgment).

158. *Id.* at 1894-95 (Scalia, J. concurring in part & concurring in judgment); *see also* United States v. R.L.C., 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part & concurring in judgment) (showing that Scalia would also be against using legislative history to resolve a grammatically *ambiguous* statute).

159. *Flores-Figueroa*, 129 S. Ct. at 1894 (Scalia, J., concurring in part & concurring in judgment); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 80-81 (1994) (Scalia, J., dissenting) (criticizing the majority for "contradicting the plain import of what Congress has specifically prescribed regarding criminal intent").

160. *Flores-Figueroa*, 129 S. Ct. at 1895 (Scalia, J., concurring in part & concurring in judgment).

161. *Id.* (Alito, J., concurring in part & concurring in judgment).

162. *Id.* (Alito, J., concurring in part & concurring in judgment).

Alito used a statute[163] making it unlawful to "knowingly transport[t] an individual who has not attained the age of 18 years in interstate or foreign commerce" as an example of a special context where the normal presumption is justifiably rebutted.[164] Notably, this statute is grammatically indistinguishable from § 1028A(a)(1), yet Alito, as well as every circuit court that has addressed the statute,[165] would apparently hold that the adverb "knowingly" would not extend to the individual's age.[166] Ultimately, Alito concluded that no special context exists in § 1028A(a)(1) that would justify a departure from the presumption that the knowledge requirement extends to each element of the offense, noting that departure in this case would lead to absurd results.[167]

V. ANALYSIS: THE SEARCH FOR PLAIN MEANING

This part is an attempt at a comprehensive analysis of the issues raised by the six circuit court opinions and the Supreme Court's majority and concurrences summarized in Part IV. First, the circuit courts' method of statutory interpretation will be discussed and the statute will be analyzed grammatically to determine which, if any, of the courts got this step "right" under their own framework. Second, the Supreme Court's opinion will be analyzed to determine whether it modifies this traditional framework in any way.

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163. 18 U.S.C. § 2423(a) (2006).

164. *Flores-Figueroa*, 129 S. Ct. at 1895-96 (Alito, J., concurring in part & concurring in judgment).

165. *See* United States v. Cox, 577 F.3d 833, 837 (7th Cir. 2009) (finding that the legislative history of the statute supported the inference that "minors need special protection against sexual exploitation" and justified declining to extend the knowledge requirement to the age element of the offense, but also noting that "a statutory *mens rea* requirement does not necessarily apply even to each element of an offense"); *see also* United States v. Griffith, 284 F.3d 338, 350-51 (2d Cir. 2002); United States v. Taylor, 239 F.3d 994, 997 (9th Cir. 2001).

166. *Flores-Figueroa*, 129 S. Ct. at 1896 (Alito, J., concurring in part & concurring in judgment).

167. *Id.* (Alito, J., concurring in part & concurring in judgment). See *supra* notes 73-75 and accompanying text for an example of the absurdity that might result from such an interpretation of the statute.

A. *Plain Meaning in the Circuit Courts*

As an initial matter, courts begin statutory analysis by looking to the statute's text to determine the "plain meaning" of a statute.[168] The rationale behind this is that the member of the public that will be affected by a statute is likely to end his inquiry into the law with a single reading of the statute's text, thus the words themselves should be given the most weight in determining the law.[169] But what does the phrase "plain meaning" really mean? Does it mean the strict grammatical interpretation of the statutory text? Or does it mean the "ordinary usage" of the words?[170] And does the meaning have to be plain to the ordinary public? To grammarians? To judges? To the illegal immigrants that are the primary target of the statute? All of these questions are wrapped up in the simple phrase "plain meaning," but none of these questions are asked or answered by the judges in the six circuit court opinions discussed in Part IV.

While it is probably going too far to require statutory text to have a plain meaning to illegal immigrants who may be unfamiliar with the English language, surely it is not asking too much for a statute's meaning to be plain to the judges deciding cases brought under the statute's authority. The judges in all six cases start their analysis with a grammatical interpretation of the statute, with three concluding the statute is ambiguous and three concluding

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168. *See, e.g.*, United States v. Godin, 534 F.3d 51, 56 (1st Cir. 2008) ("Our interpretive task begins with the statute's text. We look to the plain meaning of the words . . . ." (citation omitted)); United States v. Mendoza-Gonzalez, 520 F.3d 912, 914 (8th Cir. 2008) ("In interpreting a statute we first 'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' If so, we apply the plain language of the statute." (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997))); United States v. Villanueva-Sotelo, 515 F.3d 1234, 1237 (D.C. Cir. 2008) ("We must first 'determine whether the language at issue has a plain and unambiguous meaning . . .'" (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997))).

169. *See* Crandon v. United States, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.").

170. Liparota v. United States, 471 U.S. 419, 424 (1985) (stating that both the defendant's and the government's interpretation of a statute would "accord with ordinary usage").

that the plain meaning of the text was that "knowingly" did not extend to the phrase "of another person." Such a sharp division of the proper grammatical interpretation among the circuit courts tends to support the view that the meaning of the statute is anything but plain, but, as the Eighth Circuit Court of Appeals aptly pointed out, "'[a] mere disagreement . . . over the meaning of a statute does not prove ambiguity; it usually means that [someone] is simply wrong.'"[171] However, in this case, in a strictly grammatical analysis of the statutory text, both sides of the circuit split were "simply wrong."

While this author does not purport to be an expert in linguistics, the professors who filed an amicus brief in support of neither party for the upcoming *Flores-Figueroa* Supreme Court case certainly are.[172] The brief pointed out that "the courts that have previously considered how to interpret [the statute] have made several fundamental mistakes,"[173] specifically:

> First, it is a mistake to say that *knowingly* modifies only the statute's verbs. . . . Second, it is a mistake to say that *knowingly* modifies *transfers, possesses, or uses...a means of identification* but not *transfers, possesses, or uses...a means of identification of another person*. . . . Third, it is a mistake to say that there is any ambiguity as to what *knowingly* modifies.[174]

According to the professors, the argument that knowingly modifies only the verbs in the statute[175] "does not

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171. *Mendoza-Gonzalez*, 520 F.3d at 914 (quoting Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 461 (1999)).

172. *See* Brief of the Professors of Linguistics as Amici Curiae in Support of Neither Party at Appendix A, *Flores-Figueroa*, 129 S. Ct. 1886 (No. 08-108) [hereinafter Linguistics Brief] (listing the credentials of the four authors of the brief).

173. *Id.* at 2.

174. *Id.* at 2-3.

175. This view was held by the majority of the circuit courts. *See, e.g.*, United States v. Godin, 534 F.3d 51, 56 (1st Cir. 2008) ("In a purely grammatical sense, 'knowingly,' as an adverb, modifies only the verbs . . . ."); United States v. Mendoza-Gonzalez, 520 F.3d 912, 915 (8th Cir. 2008) ("'The fact that . . . 'knowingly' . . . is placed before the verbs 'transfers, possesses, or uses' indicates that [it] modifies those verbs, not the later language in the statute.'" (quoting United States v Hurtado, 508 F.3d 603, 309 (11th Cir. 2007))); United States v. Villanueva-Sotelo, 515 F.3d 1234, 1238 (D.C. Cir. 2008) ("The word 'knowingly' technically modifies only the verb that follows it ('uses') [and] *modifies* neither

square with the facts of ordinary English usage."[176] To underscore this point the brief provided an example where a person, "who keeps kosher eats food she thinks is kosher but that actually contains pork."[177] If adverbs only modify verbs, then it would be equally correct, grammatically speaking, to say that this person "knowingly ate," and that this person "knowingly ate pork" because in that grammatical world, knowingly would not extend to the word pork.[178] But in the world we live in, "it is hard to believe that anybody would accept the latter statement to be true; on the contrary, they would say that the person had eaten the pork UNknowingly [sic]."[179] The second sentence would be wrong because "[k]nowingly belongs to the class of adverbs that attribute to one of the actors referred to in the sentence (usually the actor referred to by the subject) a particular mental attitude toward the event that the sentence describes."[180] In sentences such as the one in § 1028A(a)(1), the direct object is "essential to the sentence's meaning" and "can influence what the verb is taken to mean."[181] Thus, it is wrong to say that the term knowingly modifies only the verbs in § 1028A(a)(1) because "the predicate of a sentence .

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the direct object ('means') nor the two prepositional phrases that follow ('of identification of another person')."); *Hurtado*, 508 F.3d at 609 ("The fact that the word 'knowingly'—an adverb—is placed before the verbs 'transfers, possesses, or uses' indicates that 'knowingly' modifies those verbs, not the later language in the statute." (citing United States v. Jones, 471 F.3d 535, 539 (4th Cir. 2006))); United States v. Montejo, 442 F.3d 213, 215 (4th Cir, 2006) ("[A]s a matter of common usage, 'knowingly' does not modify the entire lengthy predicate that follows it.").

176. Linguistics Brief, *supra* note 180, at 5.

177. *Id.*

178. *See id.*

179. *Id.*

180. *Id.* at 6 (emphasis omitted). Furthermore, "[t]his category of adverbs plays an important role in the law because it includes the mensrea [sic] adverbs such as *intentionally*, *deliberately*, and *willfully*." *Id.* at 7.

181. *Id.* at 7-8. Some examples of direct objects influencing the meaning of a sentence: "a. throw a baseball[;] b. throw support behind a candidate[;] c. throw a boxing match[;] d. throw a party." *Id.* at 8. "In each of these cases, the nature of the event described by the predicate is a function, not of the verb alone, but of the verb's interaction with its direct object." *Id.* at 9. "The three verbs used in § 1028A—*transfer*, *possess*, and *use*—are all similarly chameleon-like." *Id.* For example: "using a social security number, using a can opener, using drugs, using the internet," etc. *Id.*

. . is an integrated unit of meaning," and "an adverb such as *knowingly* operates on that unit as a whole."[182]

The brief also concluded that the *entire phrase*, "a means of identification of another person," is the direct object of the sentence, not just "a means of identification."[183] Furthermore, the professors argued that "[t]he fact that *of another person* is part of the direct object is a matter of substance, not just grammatical form" because the "phrase combines with the noun phrase to form a larger unit of meaning (much like a verb combines with its direct object to form a larger unit of meaning)."[184] Another example was used to underscore the ordinary manner in which knowingly is used and understood.[185] In the sentence, "[the licensee] did not knowingly allow the purchase of beer by a person under the age of twenty-one," the intended "plain meaning" is not only that the licensee knew that someone was purchasing beer, but also that he knew the purchaser was under the age of twenty-one.[186] In this sentence, like in § 1028A(a)(1), the "adverb *knowingly* is understood as describing the [subject's] state of mind with respect to an aspect of that more narrowly specified event," in this case it is the purchaser's age, and in § 1028A(a)(1), it is that the means of identification belongs to another person.[187] Under the strict grammatical reading of § 1028A(a)(1) offered by the professors of linguistics, "knowingly" should extend through the entire sentence to include the phrase "of another person," thus requiring the government to prove that Flores-Figueroa, and other defendants like him, actually knew that the identification they misused belonged to another person.

Two grammatical reasons the circuit courts offered for reaching the opposite conclusion are worth discussing briefly. First, the Eighth Circuit argued that "'[g]ood usage

182. *Id.* at 9. Some of the circuit courts reached this conclusion as to knowingly modifying the direct object of the statute's verbs, but did so in order to prevent "absurd" results criminalizing the transfer of "anything," not because of proper grammatical analysis. *See* United States v. Godin, 524 F.3d, 51 57-58 (1st Cir. 2008); United States v. Villanueva-Sotelo, 515 F.3d 1234, 1238 (D.C. Cir. 2008).

183. Linguistics Brief, *supra* note 180, at 10 (emphasis omitted).

184. *Id.* at 11.

185. *Id.*

186. *See id.* at 12-13.

187. *Id.*

requires that the limiting modifier . . . be as close as possible to the words which it modifies,'" and thus concluded that knowingly only modified the sentence's verbs.[188] As the brief of the professors of linguistics pointed out, "the scope of an adverb . . . is not governed solely by its linear position in the sentence" because sentences are "not simply a string of words arranged in a particular order."[189] Rather, sentences have "a hierarchical structure in which words are grouped into phrases and phrases are grouped into larger phrases."[190] In § 1028A(a)(1), knowingly precedes, and is adjacent to, the entire predicate phrase "transfers, possesses, or uses, without lawful authority, a means of identification of another person"; the entirety of which it also modifies.[191] Second, the Eighth Circuit cited the "last antecedent rule," stating that "qualifying words and phrases usually apply only to the words or phrases immediately preceding *or following them*, not to others that are more remote."[192] However, it seems that the court misstated the rule; the source that the court cited in support of their contention actually states that "[r]eferrential and qualifying words and phrases, where no contrary intention appears, refer solely to the *last antecedent*."[193] As an example, "if a sign announces discounted movie tickets for 'students, seniors, and children under the age of eight,' the qualifying phrase 'under the age of eight' is most likely meant to apply to children and not to seniors or students."[194] In this sentence, the word "children" is the antecedent of the modifying phrase "under the age of eight," but in §

188. United States v. Mendoza-Gonzalez, 520 F.3d 912, 915 (8th Cir. 2005) (quoting United States v. Montejo, 442 F.3d 213, 215 (4th Cir. 2006)).

189. Linguistics Brief, *supra* note 180, at 14.

190. *Id.*

191. *See id.* at 15. The brief also points out a further inconsistency with the Eighth Circuit's reasoning, in that courts have correctly interpreted another adverb phrase within § 1028A(a)(1), "during and in relation to any felony violation enumerated in subsection (c)," as extending through the entire sentence to include "of another person" even though it is further away from "of another person" than "knowingly" is. *Id.* (emphasis omitted).

192. *Mendoza-Gonzalez*, 520 F.3d at 915 (emphasis added) (citing SINGER & SINGER, *supra* note 118 (7th ed. 2007)).

193. SINGER & SINGER, *supra* note 118 (emphasis added).

194. Brief for the Petitioner at 25, Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009) (No. 08-108).

1028A(a)(1) "knowingly" modifies the *preceding*, not anteceding, phrase, "transfers, possesses, or uses, without lawful authority, a means of identification of another person," thus the last antecedent rule does not apply.[195]

Having pointed out the analytical errors of half of the circuit split, the professors of linguistics could have ended their grammatical analysis, but instead they showed that the other half of the circuit split was also mistaken. The professors agreed with the ultimate result that the D.C., First, and Ninth Circuits reached, that the government is required to prove the defendants had knowledge that the means of identification used belonged to another person, but disagreed with their finding that the statute itself was ambiguous.[196] These circuits analogized § 1028A(a)(1) to the statute at issue in *Liparota* that the Supreme Court held to be ambiguous.[197] However, as the brief demonstrated, the two statutes are *not* analogous. In *Liparota*, the statute had two equally possible structures depending on which phrase the final prepositional phrase referred to,[198] but in § 1028A(a)(1) "there is no feasible alternative structure."[199] The only other possibilities would produce "bizarre" results where the phrase "*of another person* is forced against its will to function adverbally," by "adjoin[ing it] directly to one of the verb phrases."[200] Thus, separating the phrase "of another person" from the direct object "is a matter of trying to force a square peg into a round hole, and it confirms that there is no alternative structure that could create a *Liparota*-style ambiguity."[201]

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195. *Id.* at 25-26.

196. Linguistics Brief, *supra* note 180, at 15-20.

197. *See, e.g.*, United States v. Miranda-Lopez, 532 F.3d 1034, 1038-39 (9th Cir. 2008).

198. The phrase "in any manner not authorized by law" could grammatically apply to different parts of the sentence at issue giving the statute either a "wide-scope structure" or a "narrow-scope structure." *See* Linguistics Brief, *supra* note 180, at 16.

199. *Id.* at 19.

200. *Id.* at 19-20. This would produce a statute where a defendant could be charged with doing the following with a means of identification: "[p]ossessing it of another person . . . [, t]ransferring it of another person . . . [or, u]sing it of another person." *Id.* at 20.

201. *Id.* at 20.

If the standard for plain meaning is strictly a grammatical one, then the Supreme Court's analysis of § 1028A(a)(1), and for that matter the analysis of this author, should have ended here,[202] but the questions surrounding the meaning of "plain meaning" still remain. As the First Circuit Court of Appeals cautioned, the search for plain meaning shouldn't be a "purely grammatical exercise" because courts are interpreting "a criminal statute and not an English textbook."[203] The fact is that it is the public at large that will be affected by a criminal statute, so the grammatically correct reading of the statute is not necessarily "the best or even [the] most likely reading of § 1028A(a)(1)."[204] When six learned judges cannot reach the correct grammatical conclusion as to the meaning of § 1028A(a)(1), why should the public be held to a higher standard? And for that matter, why is Congress' understanding of grammar assumed to be perfect?

In fact, many argue that standards of grammar and punctuation have been on the decline to the dismay of grammarians and punctuation "sticklers" everywhere.[205] But is "declining" the right word, or would "different" be more appropriate? As Geoffrey Nunberg points out in his 1983 article *Decline of Grammar*, "it is understandable that speakers of a language with a literary tradition would tend to be pessimistic about its course, [but] there is no more hard evidence for a general linguistic degeneration than there is reason to believe that Aaron and Rose are inferior to Ruth and Gehrig."[206] It is natural to disparage the present

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202. Justice Scalia, at least, argues that it does. *See* Flores-Figueroa v. United States, 129 S. Ct. 1886, 1894 (2009) (Scalia, J., concurring in part & concurring in judgment).

203. United States v. Godin, 534 F.3d 51, 56-57 (1st Cir. 2008).

204. *Id.* at 57.

205. *See, e.g.*, LYNNE TRUSS, EATS, SHOOTS & LEAVES: A ZERO TOLERANCE APPROACH TO PUNCTUATION *passim* (2003) (bemoaning the state of punctuation in the United Kingdom and the United States); Heather Grossman et al., Letters to the Editor, *E-Mail and the Decline of Writing*, N.Y. TIMES, Dec. 11, 2004, at A18 (bemoaning the decline of grammar due to the use of e-mail and texting); Richard Grant White, *Every-Day English. How English Has No Grammar*, N.Y. TIMES, Sept. 16, 1877, at 5 (bemoaning the decline of grammar standards in the late 1800s).

206. Geoffrey Nunberg, *The Decline of Grammar*, ATLANTIC MONTHLY, December 1983, at 31, *available at* http://www.theatlantic.com/issues/97mar/halpern/nunberg.htm.

for the comfort of the past, but at some point it becomes akin to sticking one's head in the sand. The English language is not static. The rules of grammar should not be used to define a language, but instead should reflect the state of the language's common usage.[207]

And it is perhaps for this reason that the Supreme Court chose not to follow the mechanistic approach of strict plain meaning statutory interpretation in favor of a more context-sensitive approach. Or did they? The majority opinion and its two concurrences lay out three different methods of statutory interpretation. How do these methods work in practice and which method is most appropriate for use in criminal law?

B. *Plain Meaning in the Supreme Court*

One thing becomes abundantly clear from the Supreme Court and circuit court opinions addressing § 1028A(a)(1)—there is more than one path to reaching a statute's plain meaning. However, each path has its pitfalls and sometimes the plain meaning reached depends more on the path chosen than the words of a particular statute. This section will review the different versions of statutory interpretation employed by the Supreme Court in *Flores-Figueroa* and will attempt to determine which analytical framework is most appropriate in the context of a criminal statute.

Over the years, the Supreme Court has employed several variations of statutory interpretation ranging from a comprehensive, "big picture" approach that takes legislative intent and other extra-textual factors into account to a strictly textual approach based solely upon the words of the statute. Both approaches have been a part of Supreme Court opinions in one form or another for as long as there have been statutes, but the strict textual approach gained

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207. Indeed, the standards of English grammar often differ vastly depending on the context or social group. *See* Jeffrey P. Kaplan & Georgia M. Green, *Grammar and Inferences of Rationality in Interpreting the Child Pornography Statute*, 73 WASH. U. L.Q. 1223, 1240 (1995) (noting that English differs grammatically in "regional dialects," "usages that are dependent on social groupings associated with the age of the speaker," and usages "associated with race").

its most recent devotee when Antonin Scalia joined the Court in 1986.[208]

Traditional plain meaning analysis begins with a statute's text and "[t]he words of a statute are to be taken in their natural sense, and ordinary signification and import."[209] Where the meaning of the words is ambiguous, extra-textual sources, most often legislative history, are examined to determine the intent of the statute. Where the Court can clearly divine such intent, it will resolve the textual ambiguity to effectuate the statute's intended purpose.[210] Where there is no ambiguity in the words of a statute, "[t]he case must be a strong one indeed to justify a Court in departing from the plain meaning of the words."[211] Examples of strong justification for departure include situations where the plain, unambiguous meaning of the statute leads to "absurd or futile results"[212] or results that are unreasonable and "plainly at variance with the policy of the legislation as a whole."[213] A plain meaning that produces unusually harsh results may also provide a strong justification for departure.

Under this traditional plain meaning approach, "[o]bviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the

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208. *See* Robin Kundis Craig, *The Stevens/Scalia Principle and Why it Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 960-62 (2005).

209. United States v. Morris, 39 U.S. (14 Pet.) 464, 471 (1840).

210. *See, e.g.*, Shapiro v. United States, 335 U.S. 1, 31 (1948) (It is the "well-settled doctrine of this Court to read a statute, assuming that it is [ambiguous], in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen.").

211. *Morris*, 39 U.S. 464, 471 (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820)).

212. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940); *see, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (declining to follow the plain meaning of a statute because it would lead to the absurd result of criminalizing innocent conduct).

213. Ozawa v. United States, 260 U.S. 178, 194 (1922). In such a situation, the Court "may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail." *Id.*

enacting body."[214] The adherent to the traditional plain meaning approach would argue that "[a] lively appreciation of [this] danger is the best assurance of escape from its threat."[215] An advocate of the strict textual plain meaning approach would likely be unconvinced by this argument because any consideration of the policy behind a statute necessarily leads to the problem of placing the judiciary in the role of the legislature.

It is against this danger that the strict textual plain meaning approach attempts to protect. Under this approach, the Court must normally limit its inquiry to "the particular statutory language at issue, as well as the language and design of the statute as a whole."[216] Generally, "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"[217] For the strict textualist, "a literal reading of Congress' words is generally the only proper reading of those words," and any attempt to divine Congress' true intentions from sources extraneous to the statute itself "is to set sail on an aimless journey."[218]

The type of statute being interpreted is a consideration that must be addressed in addition to the inherent philosophical differences between the two approaches. In criminal statutes, "a more rigid rule of construction prevails than in relation to other statutes."[219] This is because of due process and notice concerns. Specifically, Congress should be required to clearly state what constitutes criminal conduct because it is a "fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed."[220] For this

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214. *Am. Trucking Ass'ns*, 310 U.S. at 544.

215. *Id.*

216. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 220-21 (1986).

217. United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

218. United States v. Locke, 471 U.S. 84, 93 (1985).

219. United States v. Morris, 39 U.S. (14 Pet.) 464, 469-70 (1840).

220. United States v. Santos, 128 S. Ct. 2020, 2025 (2008). This principle is embodied in the judicially created "rule of lenity" which "requires ambiguous

reason, many commentators argue that the strict textual plain meaning approach is appropriate for federal criminal statutes.[221]

In contrast, civil and administrative statutes are subject to a less rigid rule of construction and the importance of plain meaning is diminished. In this situation, a more contextualized approach to statutory interpretation makes sense. This is because these statutes "are not directed at ordinary citizen speakers of English, but at a small community of lawyers, regulators, and people subject to their specific regulations."[222] Because these statutes and regulations often deal with terms of art specific to a particular industry that are often outside of the experience of an ordinary citizen, the "legislative history, established norms of construction, and other evidence about the context in which the legislation arose . . . is more likely than linguistic [plain meaning] analysis to help an outside judge shed light on what Congress meant."[223]

Each of the three opinions in *Flores-Figueroa* employed a version of statutory interpretations falling somewhere along the spectrum between the traditional plain meaning approach and the strict textual plain meaning approach.

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criminal laws to be interpreted in favor of the defendants subjected to them." *Id.* In the United States, the rule itself dates back "at least to 1820, when Chief Justice Marshall described it as 'perhaps not much less old than [statutory] construction itself.'" Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420 (2006) (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)).

221. *See, e.g.*, Craig, *supra* note 216, at 965 ("The strict plain meaning approach serves the same principles of fairness and due process [as the rule of lenity] and thus could similarly work to reduce arbitrariness in federal criminal law enforcement."); Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057, 1063 (1995) ("The one area where . . . plain meaning *does* matter involves penal and criminal statutes."); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleiinkoff and Shaw*, 45 VAND. L. REV. 715, 739 (1992) ("[O]rdinary meaning, rather than technical meaning, governs when penal statutes are construed strictly for reasons of notice to their addressees.").

222. Ross, *supra* note 229, at 1057; *see also* Craig, *supra* note 216, at 968 (arguing that federal courts should acknowledge that "highly sophisticated regulated entities and their related industry and trade political action groups and the equally sophisticated and often opposing public interest organizations" are a part of the "subculture" targeted by civil and regulatory statutes).

223. Ross, *supra* note 229, at 1057.

1. *Justice Breyer's Majority Opinion.* Justice Breyer's majority opinion is fairly textual,[224] and it recognizes that criminal statutes are normally strictly construed.[225] However, it does allow for the possibility of deviation from a statute's plain meaning in "special contexts" where extra-textual sources show that the plain meaning of the statute contradicts its intended meaning and purpose.[226] Although the opinion does not say which contexts would qualify as special, Breyer did address the issue in a much earlier opinion as chief judge on the First Circuit Court of Appeals.

In *United States v. Gendron*, then-Chief Judge Breyer was called on to interpret the same child pornography statute that was at issue in *X-Citement Video*.[227] In that opinion, he expanded on his view of a contextual inquiry:

> We concede that one cannot know automatically, *simply from the position of the words in the sentence*, just which of the words following "knowingly" the word "knowingly" is meant to modify. However, that linguistic fact simply reflects the more basic fact that statements, and parts of statements, quite often derive their meaning from context. The sentence "John knows that people speak Spanish in Tegucigalpa, which is the capital of Honduras," taken by itself, leaves us uncertain whether or not John knows that Tegucigalpa is the capital of Honduras; but, the context of the story in which the sentence appears, a context that includes other sentences, may clear up our uncertainty and leave us with no doubt at all.
>
> Similarly, when courts interpret criminal statutes, they draw upon context, including the statute's purpose and various background legal principles, to determine which states of mind accompany which particular elements of the offense. Thus, courts normally hold that the prosecutor need not prove the defendant's state of mind in respect to "jurisdictional facts" (for example, that an assault victim was a *federal* officer, or that stolen checks moved *in the mail*), whatever the mental state required for the crime's other elements. Context (what ordinarily counts as bad behavior; the reason why Congress mentions jurisdictional facts; etc.), in addition to the position of

224. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1890-94 (2009).

225. *Id.* at 1891.

226. *Id.*

227. 18 F.3d 955 (1994). Between the *Gendron* opinion and the Supreme Court's consideration of *X-Citement Video*, Breyer was appointed to the Supreme Court.

> words in a sentence, helps a court decide how, and when, to interpret statutes as incorporating states of mind.[228]

For Breyer, it appears that the average citizen's interpretation of a statute would not always be its plain meaning. Instead, the context of a statute includes various "legal principles" and legal interpretations of the words of the statute. In the statute at issue in *Gendron* and *X-Citement Video*, the legal principle that every element of an offense should have a mens rea requirement was used to extend the word knowingly to portions of the statute that appeared to be grammatically impossible.[229] If this is truly what Breyer means by "special contexts," his method of statutory interpretation may lead to notice problems in criminal statutes, where the average layman may lack the specialized legal knowledge to know exactly what has been criminalized.

2. *Justice Scalia's Concurrence.* Scalia's concurrence is strictly textual. For Scalia, the inquiry into the statute's meaning is purely grammatical and it ends "once [knowingly] is understood to modify the object of [a] verb[ ]."[230] It is hardly surprising that Scalia's strict textual approach decries the use of legislative history to "expand a statute beyond the limits [of] its text," but it also appears that Scalia disagrees with the majority opinion's use of legal "gloss" on the text.[231] He makes this point clear by renewing his disapproval of the Court's decision in *X-Citement Video*.[232] For Scalia, statutory interpretation, especially in

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228. *Gendron*, 18 F.3d at 958 (citation omitted). Interestingly, Breyer uses the same Tegucigalpa, Honduras example in *Flores-Figueroa*. *Flores-Figueroa*, 129 S. Ct. at 1890 ("Suppose Smith mails his bank draft to Tegucigalpa, which . . . is the capital of Honduras.").

229. *See Gendron*, 18 F.3d at 958.

230. *Flores-Figueroa*, 129 S. Ct. at 1894 (Scalia, J., concurring in part & concurring in the judgment).

231. *Id.* at 1894-95 (Scalia, J., concurring in part & concurring in the judgment).

232. Scalia's disagreement is with the use of legal principles to expand the meaning of the text:

> [T]he Court relies in part on the principle that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." If that is meant purely as a description of what most

the context of criminal statutes, should be strictly limited to the meaning of the text itself.

The strict textual plain meaning approach may be appropriate for use in criminal statutes, but it still has the possibility of leading to absurd and unintended results if applied too mechanically. Although it involved a civil rather than a criminal statute, *United States v. Locke*[233] is perhaps the best example of this danger. In *Locke*, the statute at issue required that the claimant of an unpatented mining claim file an intention to hold their claim "prior to December 31 of each year" or the claim would be deemed abandoned.[234] The plaintiffs in the case filed their paperwork *on* December 31st—one day too late—and lost their claim worth several million dollars after it was declared abandoned.[235] The plaintiffs argued that the term "prior to December 31 of each year" was ordinarily understood to mean by the end of the calendar year, but the Supreme Court was unwilling to go beyond the literal words of the statute.[236] Instead, the Court found that "with respect to filing deadlines a literal reading of Congress' words is generally the only proper reading of those words."[237] The Court refused to "soften the clear import of Congress' chosen words" to avoid the admittedly harsh result because to do so would "take the courts out of the realm of interpretation and place them in the domain of legislation."[238] Although Justice Scalia was not yet a member of the Supreme Court

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> cases do, it is perhaps true, and perhaps not. I have not canvassed all the cases and am hence agnostic. If it is meant, however, as a normative description of what courts *should* ordinarily do when interpreting such statutes—and the reference to JUSTICE STEVENS' concurring opinion in [*X-Citement Video*] suggests as much—then I surely do not agree. The structure of the text in *X-Citement Video* plainly separated the "use of a minor" element from the "knowingly" requirement, wherefore I thought (and think) that case was wrongly decided.

Flores-Figueroa, 129 S. Ct. at 1894 (Scalia, J., concurring in part & concurring in the judgment).

233. 471 U.S. 84 (1985).

234. *Id.* at 89.

235. *Id.*

236. *Id.* at 93.

237. *Id.*

238. *Id.* at 95-96.

when *Locke* was decided, it remains a possibility that the mechanical and inflexible application of the strict textual plain meaning approach will lead to unduly harsh and absurd results.[239]

3. *Justice Alito's Concurrence.* Justice Alito's opinion is perhaps the most interesting of the three not only due to his unique approach to the issue, but also because it is one of the first glimpses into the relatively new justice's approach to statutory interpretation. Alito seems to advocate a more traditional, context-sensitive approach that de-emphasizes the importance of ordinary English usage.

Alito, like Scalia, is concerned that the majority opinion "will be cited for the proposition that the *mens rea* of a federal criminal statute nearly always applies to every element of the offense."[240] However, he also says that "[i]n interpreting a criminal statute such as the one before us, . . . it is fair to begin with a general presumption that the specified *mens rea* applies to all the elements of an offense."[241] Although these two statements appear to be contradictory, it is possible that Alito intends the phrase "such as the one before us" to mean something like where the grammatical reading of the statute supports such an interpretation.[242] In such a case, it would be reasonable to start with this as the base presumption, but where the statute did not grammatically apply the mens rea requirement to an element, starting with this base presumption would be inappropriate.

In either situation, Alito stresses that "there are instances in which context may well rebut that presumption."[243] For Alito, context is more important than

239. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) ("I have been willing, in the case of civil statutes, to acknowledge a doctrine of 'scrivener's error' that permits a court to give unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result.").

240. *Flores-Figueroa*, 129 S. Ct. at 1895 (Alito, J., concurring in part & concurring in judgment).

241. *Id.*

242. *Id.* Alito's use of the example sentence, "The mugger knowingly assaulted two people in the park—an employee of company X and a jogger from town Y," suggests that this reading may be correct because it is grammatically dissimilar from the text of § 1028A(a)(1). *See id.*

243. *Id.* at 1895.

ordinary usage. Thus, in a grammatically indistinguishable statute involving the sexual exploitation of minors, Alito is comfortable rebutting the *mens rea* presumption to make knowledge of the victim's age irrelevant to the crime.[244] This is likely due to the oft expressed congressional intent that minors require special protection from sexual exploitation.[245] This is certainly the position that the Seventh Circuit Court of Appeals took in *United States v. Cox*,[246] one of the first decisions discussing *Flores-Figueroa*. Facing a grammatical statutory challenge similar to *Flores-Figueroa*, the court in *Cox* found that the sexual exploitation of minors presented a "special context" justifying a departure from the grammatical plain meaning of the statute, and it cited Alito's concurrence as "perhaps calling for" such a departure.[247] It will be interesting to see if Alito's hybrid presumption/contextual approach to statutory interpretation gains any more adherents among the circuit courts.[248]

CONCLUSION

Although they followed different paths in the search for plain meaning, each of the Supreme Court opinions reached the correct result in *Flores-Figueroa*. It is important to note that even though Flores-Figueroa won his appeal, he will not be going free any time soon. He will still face jail time for his two predicate offenses, entering the United States without inspection and misusing immigration documents. The practical effect of this decision will be to take away one tool that prosecutors once had to force quick plea bargains and deportation onto illegal immigrants. However, the government could still secure a conviction of Flores-Figueroa under § 1028A(a)(1) if it could prove that he knew the identification documents belonged to another person. In

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244. *Id.* at 1895-96.

245. *Id.*; *see, e.g.*, United States v. Taylor, 239 F.3d 994, 997 (2001).

246. 577 F.3d 833, 837 (7th Cir. 2009).

247. *Id.* at 838.

248. *See* Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 131 (2d Cir. 2009) (citing Alito's concurrence as authorizing a departure from the "normal approach" of the majority opinion in *Flores-Figueroa* and finding that the statute at issue involved a special context).

several of the cases considered in this Comment, such as *Miranda-Lopez* where the defendant purchased identification documents with another person's picture on them, the government would likely be able to meet this higher burden of proof. But the most important impact of the decision may be its potential effects on the search for a statute's plain meaning.

Most of the circuit court opinions interpreting § 1028A(a)(1) required an ambiguity in the statute to resort to extra-textual sources for interpretation.[249] In contrast, neither the majority opinion nor Alito's concurrence seem to require textual ambiguity and instead emphasize analyzing the context of a statute. Both also imply or state that special contexts can justify a departure from the unambiguous plain meaning of a criminal statute. Thus far, it appears that Alito's approach to statutory interpretation is being employed by at least two of the circuits, and both have found special contexts justifying departure from the plain meaning of a statute's text. Construing the unambiguous textual commands of a criminal statute against a defendant seems to violate the principles of fairness and notice inherent in the rule of lenity. Although it is too early to tell if this is the way this approach will be used, the possibility for harsh and unfair results remains.

This possible danger leads to the conclusion that a strict plain meaning approach would be most appropriate in the context of unambiguous criminal statutes. However, this recommendation comes with the caveat that absurd results, such as resulted in *Cox* and would have resulted in *X-Citement Video*, should be avoided. In civil statutes or ambiguous criminal statutes, a more contextual approach is necessary to effectuate a statutes plain meaning. Regardless of the approach taken, courts would do well to remain mindful of the target audience of a statute when

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249. *See* United States v. Godin, 534 F.3d 51, 56 (1st Cir. 2008) ("Our interpretive task begins with the statute's text. We look to the plain meaning of the words . . . ." (citation omitted)); United States v. Mendoza-Gonzalez, 520 F.3d 912, 914 (8th Cir. 2008) ("In interpreting a statute we first 'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' If so, we apply the plain language of the statute." (citation omitted) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997))); United States v. Villanueva-Sotelo, 515 F.3d 1234, 1237 (D.C. Cir. 2008) ("We must first 'determine whether the language at issue has a plain and unambiguous meaning . . . .'" (quoting *Robinson*, 519 U.S. at 340)).

determining plain meaning. If it turns out that the result reached was not the intended meaning of the statute, the true intent of Congress can be made plain through amendment easily enough.